Supreme Court, U. S.
FILED
JAN 26 1978
MICHAEL RODAK, JR., CLERK

No. 77-1055

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, A.D. 1978

OMAR M. LUNSFORD,

Petitioner,

vs.

INVESTORS DIVERSIFIED SERVICES, INC. and IDS LIFE INSURANCE COMPANY (sued herein as Investors Syndicate Life Insurance and Annuity Company),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dean E. Richards
156 E. Market 7th Floor
Indianapolis, Indiana
Counsel for Petitioner

John W. Houghton
1313 Merchants Bank Bldg.
Indianapolis, Indiana
Attorney for Respondent

INDEX

Page

Petition For Writ of Certiorari.....1
The Opinion Below.....2
Statement of the Jurisdiction.....2
Questions Presented.....2
Constitutional Provisions Involved.....5
Statement of the Case.....5
Reasons for Granting Writ.....7
Summary.....25
Conclusion.....25

APPENDIX A

December 27, 1977 decision.....

APPENDIX B

November 30, 1977 decision.....

APPENDIX C

November 30, 1977 decision.....

APPENDIX D

Order Granting Motion for Summary Judgment, dated November 23, 1976.....

AUTHORITIES CITED

Perry v. Sindermann, 408 U.S. 593, 33 L.Ed2d 570, 92 S.Ct. 2694 (1972).....7

Degan v. Investors Diversified Services, Inc., 260 Minn. 424, 110 N.W.2d 863 (1962)....9

Bussard v. College of Saint Thomas, Inc., 294 Minn. 215, 200 N.W.2d 155 (1972).....11

Miller v. O.B. McClintock Co., 210 Minn. 152, 297 N.W. 724, 729 (1941).....14

Page

Clausen & Sons v. Hamm Brewing Co., 395 F.2d, 388, 391 (8th Cir. 1968).....15

Ag-Chem v. Hahn, 480 F.2d 482 (8th Cir. 1973).....15

Bennett v. Storz Broadcasting Co., 134 N.W.2d 892, 898 (1965).....16

Carr v. Hayes, 110 Ind. 408, 11 N.E. 25 (1886).....17

Diddel v. American Security Co., 94 Ind. App. 639, 161 N.E. 689 (1932).....17

Swanson - Nunn Realty Co. v. Gentry, 134 Ind. App. 580, 186 N.E.2d 574 (1963).....17

Rhoads v. Jones, 92 Ind. 328 (1883).....17

McCaskey Register Co. v. Curfman, 45 Ind. App. 297, 90 N.W. 323 (1903).....17

Sonneborn v. S. F. Bowser & Co., 64 Ind. App. 429, 115 N.E. 66 (1917).....17

McClure v. Jeffrey, 8 Ind. 79, 83 (1856).....17

Breza v. Thaldorf, 276 Minn. 180, 149 N.W.2d 276, 278 (1967).....19

McClay v. Gluck, 41 Minn. 193, 42 N.E. 875 (1889).....20

Seibert v. Leonard, 17 Minn. 433 (1871).....20

Jansen v. Herman, 230 N.W.2d 460, 463 (1975)...21

Hyler v. Humble, 100 Ind. 38 (1884).....21

Anderson v. Miller, 76 Ind. App. 681, 133 N.W. 29 (1921).....21

Myers v. Maris, 326 N.W.2d 577 (1975).....21

Seastrom Inc. v. Amick Const., 140 Ind. App. 215, 22 N.W.2d 417 (1966).....21

Page

Trovatten v. Mines, 213 Minn. 544, 7 N.W.2d 390 (1943).....21

Mitchell v. Rendex, 255 Minn. 145, 30 N.W.2d 27.....21

New Amersterdam Gas v. Lundquist, 293 Minn. 274, 198 N.W.2d 543 (1972).....21

Youngberg v. Lambertson, 90 Minn. 100, 97 N.W. 571 (1903).....22

Hewitt v. Brown, 21 Minn. 163 (1874).....22

Van Santfoord v. Smith, 79 Minn. 316, 82 N.W. 642 (1900).....22

Homas Mfg. Co. v. Long, 242 F.2d 645 (1957)....25

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, A.D. 1978

No.

OMAR M. LUNSFORD,

Petitioner,

vs.

INVESTORS DIVERSIFIED SERVICES, INC. and IDS LIFE INSURANCE COMPANY (sued herein as Investors Syndicate Life Insurance and Annuity Company),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Seventh Circuit dated November 30, 1977, and said Petition for Rehearing was denied on December 27, 1977. That said judgment by the Seventh

Circuit Court of Appeals resulted in affirming the trial court's judgment in granting Respondent's Motion For Summary Judgment.

THE OPINION BELOW

The final opinion of the United States Court of Appeals for the Seventh Circuit was unpublished per curiam order. The date of said opinion was November 30, 1977.

STATEMENT OF JURISDICTION

The denial of the petition for rehearing took place on December 27, 1977. The statutory provision believed to confer jurisdiction upon this Court is Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States District Court erred in granting Respondent's Motion for Summary Judgment on November 23, 1976. This matter concerns an action by the Petitioner to seek recovery from the Respondent, Investors Diversified Services, for wrongful termination of his employment relationship with such Respondent. The Petitioner was terminated by the Respondent on October 9, 1974, and Petitioner thereafter brought this diversity based civil action seeking damages from Respondent. The question is whether the trial court erred in granting said Motion For Summary Judgment and finding that there are no issues of material facts in dispute and that the Respondent was entitled to a judgment

as a matter of law based upon Petitioner's civil complaint. The trial court, in its memorandum entry accompanying the order granting the Motion For Summary Judgment, stated that:

> The issue before the Court is whether the Defendants acted in accordance with the contracts between the parties in terminating the Plaintiff's employment upon thirty days notice.

Such was not really the issue before the trial court because the Petitioner clearly demonstrated why the thirty day termination provision should not be recognized and followed and argued said point in great detail in the Petitioner's Motion and Response to Respondent's Motion for Summary Judgment before the trial court. The United States Court of Appeals for the Seventh Circuit, in its order, adopted the trial court's memorandum and affirmed the judgment of the trial court and thus adopted the trial court's memorandum entry. That further, the trial court held in said memorandum:

> The Plaintiff has not tendered to the Court any statement of genuine issue of fact, which is required by Rule 10 of the Local Rules of this Court when opposing a Motion for Summary Judgment.

The trial court further stated:

> The Plaintiff's Brief in Opposition to the Motion makes

it clear that the material facts herein are not in dispute and that the court must interpret the applicable law in light of such facts.

The Petitioner, in his response to Respondents' Motion for Summary Judgment, stated that there was genuine and essential issues of fact presented and that the Respondents were not entitled to a judgment on the basis of the record heretofore made and that they sought a Summary Judgment on the basis of an incomplete record as to the facts; and further, that the Respondents sought Summary Judgment on the basis of misstatements as to the applicable law to the case. The Petitioner further submitted a memorandum on the facts to the trial court that conflicted with the Respondents' allegations. In the Petitioner's Memorandum In Opposition to said Respondents' Motion For Summary Judgment, argued that the written agreements were incomplete sketches merely outlining and vaguely describing and in some important incidences fictitiously describing the actual business relationship between the Petitioner and the Respondent in that the Petitioner's true contractual status, was readily demonstratable by proevidence, and was such as to entitle him to continue to hold the position he held with the Respondent immediately prior to his termination by the Respondent unless a reason developed for his termination that would constitute cause for termination within the normal usage common to the Petitioner and Respondents' mutual field of endeavor.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States prohibits the taking of property without due process.

STATEMENT OF THE CASE

Petitioner appeals to the Seventh Circuit from a Judgment Entry rendered by the trial court in the Southern District of Indiana, Indianapolis Division on November 23, 1976. This matter concerns an action by the Petitioner to seek recovery from the Respondent, Investors Diversified Services, for wrongful termination of his employment relationship with such Respondent.

The Motion For Summary Judgment was filed after Petitioner filed his Second Amended Complaint on January 23, 1976. An answer was soon filed thereto and on June 10, 1976, Respondent filed their Motion For Summary Judgment, Proposed Findings of Facts, and Conclusion of Law, and Respondent also filed a Brief in Support of Motion for Summary Judgment. On July 14, 1976, the Petitioner filed a Response to Defense Motion for Summary Judgment and on July 29, 1976, the Respondent filed a Reply Brief in Support of Motion for Summary Judgment. That also on July 29, 1976, the Respondent filed a Request for Oral Argument.

That on November 10, 1976, Oral Argument on Respondents' Motion for Summary Judgment was held before the trial court. That on November 23, 1976, the Court issued an Order granting Respondents'

Motion for Summary Judgment and issued a Memorandum Entry with said Order (See Appendix).

That on December 14, 1976, the Petitioner filed Notice of Appeal and also filed on said day a Request to Clerk to Prepare Transcript of Proceedings. That based upon the pleadings and the discovery conducted, the facts concerning the case are that Petitioner entered into an employment contract with Respondent effective August 1, 1968, and entered into a similar agreement effective January 1, 1969. That the Petitioner had been employed by the Respondent prior to the execution of these written agreements. A copy of said employment agreements are set out in the Appendix.

The Petitioner was terminated by the Respondent on October 9, 1974, and Petitioner thereafter brought this diversity based civil action seeking damages from Respondent, Investors Diversified Services. The question is whether the Court erred in granting said Motion for Summary Judgment in finding that there are no issues of material fact in dispute, and that the Respondent was entitled to a Judgment as a matter of law based upon Petitioner's complaint.

That on November 30, 1977, the United States Court of Appeals For The Seventh Circuit affirmed the trial court's memorandum entry in granting Respondents' Motion for Summary Judgment. That on December 27, 1977, the Seventh Circuit Court of Appeals denied Petitioner's - Appellant's Petition for Rehearing.

REASONS FOR GRANTING WRIT

The Seventh Circuit erred in affirming the Trial Court's finding that the Respondent was entitled to judgment as a matter of law in that the Trial Court erred in holding that a Summary Judgment will lie against Petitioner who is asserting that he had a life-time employment contract where the assertion is based upon the customs and usage of an institutional or corporate employee of Petitioner. In Petitioner's response to Respondent's Motion for Summary Judgment, the Petitioner argued that the Respondent sought Summary Judgment on the basis of mis-statements as to the law applicable to the case and to the facts. In support of said argument, the Petitioner says as follows:

In Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972) an action for breach of contract was brought in a United States District Court by a college professor against a College that granted explicit tenure to none of its employees and had an explicit policy of not doing so. The thrust of the Petitioner's complaint turned upon his First Amendment Rights which, of course, could not be relevant here but the case ultimately was decided upon the question of whether due process of law would permit a determination against the Petitioner's complex property right assertions by means of summary judgment proceedings. When the case reached the United States Supreme Court its status was summarized as follows by this Court in what was, for all practical purposes, a unanimous

decision by that Court on the procedural question at hand herein:

> The Court of Appeals reversed the judgment of the District Court, 430 F.2d 939. First, it held that, despite the Respondent's lack of tenure, the nonrenewal of his contract would violate the Fourteenth Amendment if it in fact was based on his protected free speech. Since the actual reason for the Regent's decision was 'in total dispute' in the pleadings, the court remanded the case for a full hearing on this contested issue of fact. Second, the Court of Appeals held that, despite the Respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the Respondent could show that he had an 'expectancy' of re-employment. (Emphasis supplied).

Perry v. Sindermann, supra at U.S. 596 & S.Ct. 2697. The Supreme Court quickly disposed of the First Amendment question and held it sufficient to require the setting aside of the summary judgment that had been entered. But then the Supreme Court went on to also uphold the Prosessor's simple, procedural assertion that summary judgment did not lie in light of what the Supreme Court found to be prevailing contract law "in most, if not all, jurisdictions."

The Perry v. Sindermann decision noted a possible basis for the fired employee to show that he had a contractual right to be continued in his position notwithstanding the fact that his written contract, on its face, had expired and that there were express provisions to the effect that no employee was to be considered as having tenure. This holding was rendered notwithstanding the fact that in Perry v. Sindermann all relevant written materials bearing upon the question of a right against being terminated without cause were before the District Court at the time that summary judgment was rendered. Nothing approaching that state of the record obtains in this case. The Respondent herein is seeking summary judgment after it alone has had any appreciable discovery relief and, as heretofore noted, numerous writings incorporated by reference in the subject agreements still not a part of the record herein. Under Perry v. Sindermann the Petitioner is entitled to go well beyond those yet to be presented writings and yet the Respondent is here seeking summary relief on the basis of written agreements which are incomplete on their face.

The Seventh Circuit relied upon the case of Degan v. Investors Diversified Services, Inc., 260 Minn. 424, 110 N.W. 2d 863 (1962) (hereinafter "the Degan case") which the Respondent presented at page 31 of its Brief-In-Support and which the Respondent calls "the case most directly applicable to the one at

bar" because it "involved an action for a breach of an alleged lifetime employment contract," because the holding involved "circumstances remarkably similar to the case at bar" and because the Petitioner therein had been told that he, like the Petitioner herein had been told to consider this position "'a career situation'" which the Minnesota Supreme Court found to be an agreement terminable at the will of either party. Unmentioned is the most obvious similarity, that the Respondent in that case is the same as the Respondent in this case.

It would appear that the Respondent's reliance upon the Degan case is not confined to their brief in this cause and that the Respondent apparently has operated for more than a decade under the impression that the Degan holding gives them an unbridled license to tell any numbers of lies to and make any number of blue sky promises to their employees and agents regarding job security. Such reliance is very ill taken.

The Degan case is not at all analogous to Petitioner's cause. Degan was a salaried desk bound, office employee under no written contract, no covenant not to compete, no commissions and, what is more important, no higher than ordinary commissions dictated by length of service. Also, there was no accumulated good will acquired in what had been a virgin division and which became a windfall to IDS upon the employee's depart-

ure. (The Degan holding also is not analogous from the standpoint of whether summary judgment will lie herein because the decision in that case shows that the Court had the benefit of seeing all of the company regulations, pension fund materials and other materials relevant to Degan's employment status.)

The Respondent proposed in its tendered Findings and Conclusions that the Court find that there is no difference in the law of the two states, i.e. Minnesota and Indiana.

The written agreements provide that they are to be interpreted under Minnesota law and the Petitioner would prefer that the Respondent honor at least this aspect of those agreements.

The more recent (and more applicable) Minnesota case of Bussard v. College of Saint Thomas, Inc. 294 Minn. 215, 200 N.W.2d 155 (1972) had this to say about the Degan holding (actually the Skagerberg holding upon which the Degan holding relies and which the Respondent also cites in its Brief immediately after Degan):

> The leading Minnesota case dealing with contracts for permanent or lifetime employment is Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936) noted, 35 Mich. L.Rev. 321, 21 Minn. L.Rev. 748. We there

indicated adherence to the somewhat arbitrary rule of most jurisdictions that a contract for 'permanent employment' will be construed to be terminable at the will of either party except in compelling circumstances, such as where the employee in effect purchases the permanent employment by giving a valuable consideration other than his customary daily services or otherwise giving up more than one normally gives up when he agrees to take on a new employment. The rule is arguably too mechanical an answer to the more basic issue of ascertaining the real intent of the parties. 22 Minn. L. Rev. 731, but no re-examination of the rule is necessary in this case. This Petitioner clearly did furnish the valuable consideration contemplated by the existing rule." (Emphasis supplied)

Bussard v. College of Saint Thomas, supra, at N.W.2d 161. Thus in Bussard the Minnesota Supreme Court not only questioned the rule relief upon by the Respondent and stated that it was an oversimplification due for re-examination, and inapplicable where a person, in undertaking and performing in the course of employment, gives up more than one normally puts in to such an undertaking, it also held that Skagerberg (and presumably Degan) don't even present a question where there is clear independent consideration given in exchange for a job believed to be permanent.

The Petitioner herein does not assert that he gave additional consideration wholly analogous to that given by Bussard to the defendant in that case, but he does assert that he falls well into the category of "having given up more than one normally gives up when he agrees to take on a new employment."

Petitioner's additional consideration is the subject of ample discussion in the memorandum on the facts which precedes Petitioner's trial memorandum on the law and it would serve no purpose to again recite it here. What is important to emphasize here is the fact that the Minnesota Supreme Court does not lump all employment agreements under those legal chestnuts which the defense repeatedly cites from Indiana cases having no legal application here. Quite to the contrary, the Minnesota Supreme Court has held that termination-at-will contract provisions are to be looked upon with disfavor and to be of no effect where qualified provisions or termination also appear in the contract. The reasoning behind such a view is obvious. Where there is termination at will there is no need to provide for termination for cause.

> Courts are inclined to construe a contract so as not to allow a party to terminate at will without cause. Clauses that a contract may be terminated or cancelled for breach of default are construed as being intended for the benefit of the party who is not

guilty of breach or default, not the one who is . . . It was not necessary to give the licensor a right to cancel the contract for cause if he had the right to terminate it at will. It necessarily follows that he had no right of termination at will. Furthermore, a construction authorizing termination at will renders meaningless and superfluous the provisions for termination by mutual consent as well as those by notice and action. Our conclusion is that neither party had the right to terminate the contract at will.

Miller v. O.B. McClintock Co.,
210 Minn. 152
297 N.W. 724, 729 (1941).

In a much more recent case the Court of Appeals for the Eighth Circuit has construed Minnesota law as not permitting the termination of a franchise holder at the will of the franchisor where the holder has made a substantial investment in facilities to make use of the franchise:

> Thus we feel that under Minnesota law where an exclusive franchise dealer under an emplied contract, terminable on notice, has at the instance of a manufacturer or supplier invested his resources and a credit in establishment of a costly distri-

> bution facility for the supplier's product, and the supplier thereafter unreasonably terminates the contract and dealership without giving the dealer an opportunity to recoup his investment, a claim (for breach of contract) may be stated.

Clausen & Sons v. Hamm Brewing Co.,
395 F.2d
388, 391 (8th Cir. 1968)

Also see: Ag-Chem v. Hahn,
480 F.2d 482 (8th Cir. 1973)
(Involving a Minnesota Corp. & an Indiana licensee.)

In the Petitioner's case, of course, he invested a lifetime career in his franchise rather than a physical plant to be used as a distribution facility, but the applicability of this aspect of Minnesota law is nonetheless apparent.

The agreements herein, by their own terms, are to be construed under Minnesota law, and so construed, there is no question that the Petitioner's covenant not to compete with the Respondents upon separation from his employment constituted, in the terms of the previously quoted decision in Bussard v. College of Saint Thomas, supra, "more than one normally gives up when he agrees to take on a new employment." The Minnesota holding on the enforceability of such covenants (to which plaintiff made a confession of judgment in the covenant) is as follows:

This court has uniformally upheld covenants in a contract of employment designed to protect the employer against the deflection of trade or customers by the employee by means of the opportunity which the employment has given him; or to protect the legitimate interest of the business or professional man about to employ another under circumstances where the employee is given access to the employers patronage, customers, clients, or trade secrets. National Benefit Co. v. Union Hospital Co., 45 Minn. 255, 47 N.W. 806; Nelson v. Johnson, 38 Minn. 255, 36 N.W. 868; Holliston v. Ernston, 124 Minn. 49, 144 N.W. 415; Gibbons v. Hansch, 185 Minn. 290, 240 N.W. 901; Williams v. Thomson, 143 Minn. 454, 174 N.W. 307; Granger v. Craven, 159 Minn. 296, 199 N.W. 10, Menter Co. v. Brock, 147 Minn. 407, 180 N.W. 533, Standard Oil Co. v. Bertelsen, 186 Minn. 483, 243 N.W. 701; People's Cleaning & Dyeing Co., Inc. v. Share, 168 Minn. 474, 210 N.W. 397; Andres v. Cosgriff, 175 Minn. 431, 221 N.W. 642; Shaleen v. Stratte, 188 Minn. 219, 246 N.W. 744; Peterson v. Johnson Nut Co., 204 Minn. 300, 283 N.W. 561.

Bennett v. Storz Broadcasting Co., 134 N.W.2d 892, 898 (1965)

The Respondent cited a number of Indiana cases in support of its motion, even though Minnesota law expressly governs the employment contract. The "early case of" Carr v. Hays, 110 Ind. 408, 11 N.E. 25 (1886) is cited to the effect that a written contract is the exclusive and only evidence of parole statements preceding and concurrent with it. The Indiana cases of Diddel v. American Security Co., 94 Ind. App. 639, 161 N.E. 689 (1932); Swanson - Nunn Realty Co. v. Gentry, 134 Ind. App. 580, 186 N.E. 2d 574 (1963); Rhoads v. Jones, 92 Ind. 328 (1883); McCaskey Register Co. v. Curfman, 45 Ind. App. 297, 90 N.W. 323 (1903); Sonneborn v. S. F. Bowser & Co., 64 Ind. App. 429, 115 N.E. 66 (1917) and McClure v. Jeffrey, 8 Ind. 79, 83 (1856) are cited to the same effect, all of them correctly cited as they pertain to Indiana law.

Minnesota law permits parole evidence to establish that a written agreement does not state the whole relationship of the parties, that differing oral promises were made while the contract was still executory and that there were oral conditions precedent to a contract.

> A determination of whether the written document is a complete and accurate 'intergration' of the terms of the contract is not made solely by an inspection of the writing itself, important as that is, for the writing must be read in light of the situation of the parties, the subject matter and purposes of the transaction

and like attendant circumstances, Jimmerson v. Troy Seed Co., 236 Minn. 395, 53 N.W. 2d 273 (1952); Bjornstad v. Northern States Power Co., 195 Minn. 439, 263 N.W. 289 (1935); Cargill Commission Co. v. Swartwood, 159 Minn. 1, 198 N.W. 536 (1924); Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co., 66 Minn. 156, 68 N.W. 854 (1896).

Bussard v. College of St. Thomas, Inc., supra, at 200 N.W.2d 155

The Bussard decision refers to this as "the incomplete contract exception to the parole evidence rule," a rule which is left barely intact under Minnesota law. (In contrast to Indiana law).

Also, under Minnesota law, parole evidence is proper to show changes in a written contract which took place while it was still executory:

> Defendants argue that plaintiff pleaded and proved an express contract to build a garage with a permanent roof, not a modified contract to build a garage with only a temporary roof, and that accordingly there was no consideration for defendants' subsequent promise to make what amounted to a partial payment prior to full performance of the contract. This argument falls upon the fact that the jury found, as it could under

> the amended pleadings and the evidence, that the parties had during the progress of construction verbally agreed to modify the terms of the original contract. Defendants frankly concede that, once the finding of a modified contract is sustained, no issue of consideration is presented, for the original consideration would attach to and support a modification made while the original contract was still executory. (Emphasis supplied).

Breza v. Thaldorf, 276 Minn. 180, 149 N.W. 2d 276, 278 (1967)

Nor is the law stated in Breza v. Thaldorf, supra, any new or one-time development in Minnesota law.

> Action to recover a balance claimed to be due upon a contract for the erection of a building, and for extra work on the building. Plaintiff had a verdict. The evidence was sufficient to justify it. It can hardly be said that any question of law is presented. Parties may by parole modify a written executory contract under seal, either by changing its terms or waiving its conditions, if they have acted under and executed it as so

> modified. That the parties to this contract agreed on the waivers and modifications claimed by plaintiff, and acted under and executed it accordingly, were questions for the jury, and the evidence justified their findings.
>
> McClay v. Gluck, 41 Minn. 193, 42 N.E. 875 (1889)
>
> Also see:
>
> Seibert v. Leonard, 17 Minn. 433 (1871)

Of less importance in this particular case, but of nonetheless substantial significance in demonstrating the great difference between the law of Minnesota and these of Indiana regarding the interpretation of contracts is the admissability of oral statements to show that a written contract was the subject of a condition precedent:

> In Minnesota we have repeatedly held that parole evidence is admissable to show that, notwithstanding the deliverv of an instrument, the intention of the parties was that it should not become operative as a binding contract except upon the happening of a future contingent event. Skaaras v. Finnegan, 31 Minn. 48, 16 N.W. 456 (1883); Smith v. Mussetter, 58 Minn. 159, 59 N.W. 885, (1894); Minar Rodelius Co. v. Lysen, 202 Minn. 149, 277 N.W.

> 523 (1938); Hamilton v. Boyce, 234 Minn. 290, 48 N.W.2d 172 (1951).
>
> Jansen v. Herman, 230 N.W.2d 460, 463 (1975)

On the subject of parole statements made subsequent to a contract the contrast between Indiana and Minnesota law is almost one hundred eighty degrees. The defense cites the Indiana cases of Hyler v. Humble, 100 Ind. 38 (1884); Anderson v. Miller, 76 Ind. App. 681, 133 N.W. 29 (1921); Myers v. Maris, 326 N.W.2d 577 (1975) and Seastrom Inc. v. Amick Const., 140 Ind. App. 215, 22 N.W.2d 417 (1966) to the effect that there must be a separate and distinct and additional consideration to support an oral undertaking made subsequent to the execution of a contract. Already cited herein by Petitioner is the emphasized portion of the quote from Breza v. Thaldorf, supra, a Minnesota case to the effect that "the original consideration would attach to and support a modification made while the original contract was still executory." In addition, the Minnesota cases of Troyatten v. Mines, 213 Minn. 544, 7 N.W.2d 390 (1943) and Mitchell v. Rendex, 255 Minn. 145, 30 N.W.2d 27 flatly state that a written contract may be changed by parole and New Amersterdam Gas v. Lundquist, 293 Minn. 274, 198 N.W. 2d 543 (1972) states that a written contract may be modified by an oral contract. It also has been held by the Supreme Court of Minnesota that it is competent for the parties to a written agreement to change or modify the same and by new conditions not in

writing waive or qualify the terms of the written contract: Youngberg v. Lambertson, 90 Minn. 100, 97 N.W. 571 (1903). In addition, two early Minnesota cases also hold flatly that a written agreement may be modified by a subsequent parole agreement: Hewitt v. Brown, 21 Minn. 163 (1874) and Van Santfoord v. Smith, 79 Minn. 316, 82 N.W. 642 (1900).

None of the foregoing Minnesota case holdings in any way resemble what the defense attempts to represent as constituting Minnesota law on the interpretation of contracts, the said representation being based upon the device of first suggesting that Minnesota and Indiana law probably are the same and then relying solely upon Indiana case holdings. Both of the subject written agreements are unequivocal in providing that:

> This Agreement shall be deemed to be a Minnesota contract and governed by the laws thereof.

Exhibit B pg. 4 & Exhibit A pg. 4

Minnesota law regarding the interpretation precludes any summary judgment as the record stands herein with discovery having been undertaken and completed only by the party moving for such judgment.

One additional contrast between Minnesota and Indiana law should be noted. At pages 21 through 39 of its Brief in Support of Motion for Summary Judgment the defense insists, on the basis of Indiana rulings,

that consideration from that stated in the contract while Minnesota case, Bussard v. College of St. Thomas, supra, speaks only of "giving up more than one normally gives up when he agrees to take on a new employment" and Breza v. Thaldorf, supra, states flatly that "the original consideration would attach to and support" an oral modification of a written contract.

The trial Court in it's Memorandum Entry accompanying the Order granting Motion for Summary Judgment stated that:

> The issue before the Court is whether the defendants acted in accordance with the contracts between the parties in terminating the plaintiff's employment upon thirty days' notice.

Such was not really the issue before the Court because the Petitioner clearly demonstrated why the thirty day termination provision should not be recognized and followed and argued said point in great detail in Petitioner's Motion in Response to Respondent's Motion for Summary Judgment.

That further the Court held in said Memorandum:

> The plaintiff has not tendered to the Court any statement of genuine issues of fact, which is required by Rule 10 of the Local Rules of this Court when opposing a motion for summary judgment.

The Court further stated:

> The plaintiff's brief in opposition to the motion makes it clear that the material facts herein are not in dispute and that the Court must interpret the applicable law in light of such facts.

The Petitioner, in his response to Defense Motion for Summary Judgment stated that there were genuine and essential issues of facts presented and that the Respondents were not entitled to a Judgment on the basis of the record heretofore made and that they sought a Summary Judgment on the basis of an incomplete record as to the facts and further that the Respondent sought Summary Judgment on the basis of misstatements as to the law applicable to the case.

That further in said pleading the Petitioner presented an argument in his statements as to whether the material facts were in dispute as follows:

In the memorandum on the facts which follows immediately hereinafter the principal thrust of the Petitioner's presentation is to the effect that the written agreements herein were incomplete sketches merely outlining and vaguely describing and, in some important instances, fictitiously describing the actual business relationship between the Petitioner and the Respondents and that the Petitioner's true contractual status, readily demonstrable by parole evidence, was such as to entitle him to continue to hold the position he

held with the Respondents immediately prior to his termination by the Respondents unless a reason developed for his termination that would constitute cause for termination within the normal usages common to the Petitioner's and Respondent's mutual field of endeavor.

SUMMARY

In summary, the Court erred in construing Bussard in considering the facts to be similar and the Court's assertion that Petitioner's claim for lifetime employment was insufficient as new consideration was clearly not shown. Even if new consideration would be shown at a trial, then said consideration was sufficient as a matter of law to serve as consideration for the Respondent's alleged promises.

Summary Judgment remedy is extreme and not to be used as a substitute for trial, and any doubt as to existence of triable issues of material fact must be resolved against movant. Homan Mfg. Co. v. Long, 242 F.2d 645 (1957).

CONCLUSION

For all of the foregoing reasons, the decision of the trial Court below should be set aside and remanded with instructions to set aside its order granting Respondent's Motion for Summary Judgment and to proceed further in this matter and for all other proper relief.

DEAN E. RICHARDS, Attorney

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

December 27, 1977

BEFORE

Hon. Philip W. Tone, Circuit Judge

Hon. William J. Bauer, Circuit Judge

Hon. William J. Campbell, Senior District Judge

OMAR M. LUNSFORD,	) Appeal from the United
Plaintiff-Appellant,	) States District Court
vs.	) for the Southern
NO. 77-1360	) District of Indiana,
INVESTORS DIVERSIFIED	) Indianapolis Division
SERVICES, INC., et al.,	) NO. IP 75-141-C
Defendants-Appellee.	) James E. Noland, Judge.

O R D E R

On consideration of the petition for rehearing filed in the above entitled cause by the plaintiff-appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

(Argued November 28, 1977)

November 30, 1977

BEFORE

Hon. Philip W. Tone, Circuit Judge

Hon. William J. Bauer, Circuit Judge

Hon. William J. Campbell, Senior District Judge

OMAR M. LUNSFORD, Plaintiff-Appellant,	) Appeal from the United
NO. 77-1360 vs.	) States District Court
INVESTORS DIVERSIFIED SERVICES, INC., et al., Defendants-Appellee.	) for the Southern District of Indiana, Indianapolis Division) No. IP 75-141-C James E. Noland, Judge.

O R D E R

The court, having read the briefs and heard oral argument, is persuaded that the District Court's judgment is correct for the reasons stated by Judge Noland in his memorandum entry. We adopt that memorandum and affirm the judgment.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

November 30, 1977

BEFORE

Hon. Philip W. Tone, Circuit Judge

Hon. William J. Bauer, Circuit Judge

Hon. William J. Campbell, Senior District Judge

OMAR M. LUNSFORD, Plaintiff-Appellant,	) Apoeal from the United States District Court for the Southern
NO. 77-1360 vs.	) District of Indiana, Indianapolis Division
INVESTORS DIVERSIFIED SERVICES, INC., et al., Defendants-Appellees.	) No. IP 75-141-C James E. Noland, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

OMAR M. LUNSFORD, PLAINTIFF, VS. INVESTORS DIVERSIFIED SERVICES, INC., and INVESTORS SYNDICATE LIFE INSURANCE AND ANNUITY COMPANY, DEFENDANTS.	NO. IP 75-141-C

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT.

This cause is before the Court upon the motion of the defendants for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Whereupon the Court, having examined and considered such motion and the briefs in support thereof, the plaintiff's response in opposition thereto, and the pleadings and discovery documents tendered to the Court, and having held a hearing on such motion wherein oral argument was heard and considered and being duly

advised in the premises, the Court finds that there are no issues of material fact in dispute and that the defendants are entitled to judgment as a matter of law on the plaintiff's complaint. Therefore, the defendants' motion for summary judgment should be, and the same is hereby, GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that summary judgment is hereby entered in favor of the defendants on the plaintiff's complaint, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Costs are to be borne by the plaintiff.

DATED this 23rd day of Nov., 1976.

/s/ James E. Noland
JAMES E. NOLAND, U.S. District Judge

MEMORANDUM ENTRY

The plaintiff has brought this diversity based civil action seeking to recover from the defendants, his former employers, for the alleged wrongful termination of his employment relationship with such defendants. The defendants have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure asserting that in light of the undisputed facts herein they are entitled to judgment as a matter of law.

The undisputed facts appearing through the pleadings filed and discovery conducted herein indicate that effective August 1, 1968, the plaintiff entered into a Divisional Sales Manager's Agreement with defendant Investors Diversified Services, Inc. The plaintiff entered into a similar agreement effective January 1, 1969, with defendant Investors Syndicate Life Insurance and Annuity Company. The plaintiff had been employed by the defendants for a number of years prior to the effective date of the particular written agreements executed herein. Such written agreements contained a provision to the effect that any prior agreement between the parties was thereby cancelled and superseded as of the effective date of the agreement. It was also provided that such agreements were to be governed by the laws of the State of Minnesota and the parties herein have agreed that the laws of such state are controlling herein. On October 9, 1974, each defendant gave to the plaintiff a thirty (30) day written notice of termination of such contracts

with the plaintiff. The plaintiff has been paid the overwritings and commissions to which he was entitled through November 11, 1974, and he has not made any claim for monies due him under the contracts prior to his termination.

The issue before the Court is whether the defendants acted in accordance with the contracts between the parties in terminating the plaintiff's employment upon thirty days' notice. The defendants assert such terminations were appropriate under the contracts. The plaintiff argues that both prior to and after the execution of such contracts he was orally promised permanent or lifetime employment by agents of the defendants and that the defendants breached such promises by their termination of the plaintiff's employment. The defendants respond to that argument by asserting that even assuming such promises were made they were indefinite, lacking in mutuality, and without consideration, and, therefore, are unenforceable as a matter of law.

The Court would initially point out that the written agreements between the parties contained the following provision:

> Termination by Parties. This Agreement may be terminated by either party without cause upon thirty (30) days written notice to the other party....

No written amendments to or modifications of the written agreements were executed by the parties subsequent to the respective effective dates of the written agreements. Therefore, unless the plaintiff can demonstrate any reason why the above termination provision should not be recognized and followed, the defendants' termination of the plaintiff's employment must be upheld.

The plaintiff has asserted three primary arguments in support of his claim that the written provisions concerning termination should not be enforced herein. The plaintiff initially asserts that prior to the execution of the agreement, agents of the defendants made certain promises to him to the effect that he "need not worry about his future" and that he was being given "a lifetime job." The Court believes that even if such oral statements were made to the plaintiff they are insufficient as a matter of law to vary the clear and unambiguous provision of the contracts relating to termination. This principle is universally recognized in the majority of jurisdictions and the Court believes it need only briefly recite Minnesota authority following such general principle. In the recent case of Jansen v. Herman, ____Minn.____, 230 N.W.2d 460 (1975), the Supreme Court of Minnesota stated as follows:

> The law is clear that oral evidence of discussions, negotiations, or understandings is not admissible to vary or contradict the terms of a clear, unambiguous, and integrated written contract. (citations omitted) 230 N.W.2d at 463.

Similarly, in Telex Corporation v. Balch, 382 F.2d 211, (8th Cir. 1967), the Court in applying Minnesota law recognized:

> Any agreements relating to the subject matter of the contract, occurring prior to the written contract, are conclusively presumed to be incorporated into the writing. 382 F.2d at 215.

For other authority supporting these principles and applicable herein see Lehman v. Stout, 261 Minn. 384, 112 N.W.2d 640 (1961); Karger v. Wangerin, 230 Minn 110, 40 N.W.2d 846 (1950). The Court believes that the written agreements were a complete integration of the parties' contractual understanding and that the term with respect to the mutual rights of termination is clear and unambiguous. It is not proper to allow extrinsic evidence to contradict or modify terms which are clear on their face and which need no explanation. Jansen v. Herman, supra; See also Mack v. Earle M. Jorgensen Co., 467 F.2d 1177, 1180 (7th Cir. 1972). Even assuming such vague statements were made to the plaintiff prior to execution of the agreements herein, the Court does not believe they preclude the defendants' termination of the plaintiff's employment as long as the notice provisions were complied with.

The plaintiff next contends that certain oral statements and promises made to him after the execution of the written agreements support his claim for relief

herein. The plaintiff relies on certain statements of the defendants' regional manager to the effect that the plaintiff had a "job as long as the company is here" and "until he retires." The Court does not believe that even if such statements were made to the plaintiff they allow the maintenance of this action. Initially, it is believed such statements are so vague and indefinite that they do not create any enforceable obligation on the part of the defendants. In the case of Degen v. Investors Diversified Services, Inc., 260 Minn. 424, 110 N.W.2d 863 (1962), the Supreme Court of Minnesota was faced with a situation quite similar to the one herein and affirmed the granting of summary judgment for the defendant employer. In Degen, the employee was made similar promises of "lifetime" employment and the Court held such promises are not sufficient to establish a lifetime contract. Id. at 866. In finding the contract to be too indefinite to enforce and terminable at the will of either party the Court relied on the case of Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W.2d 872 (1936) wherein the same court recognized:

> [Where] parties to a contract of service expressly agree that the employment shall be permanent, the law implies, not that the engagement shall be continuous or for any definite period, but that the term being indefinite the hiring is merely at will. 266 N.W.2d at 873-74.

For other authority recognizing that oral promise of "permanent" or "lifetime" employment are unenforceable in the absence of additional consideration for such promises and the employment is terminable at the will of either party, see Pearson v. Youngstown Sheet and Tube Company, 332 F.2d 439 (7th Cir. 1964) cert. denied 379 U.S. 914 (1964); Shaw v. S.S. Kresge Co., ___ Ind. App. ___, 328 N.E.2d 775 (1975); 53 Am. Jur. 2d, Master & Servant §33 (1970); Annot., Validity and Duration of Contract Purporting To Be for Permanent Employment, 60 A.L.R. 3d 226 (1974).

In light of the above authority and the fact that the written agreements herein unequivocally provide for termination without cause by either party upon thirty days' notice, the Court believes the plaintiff's second basis for maintenance of this action is legally insufficient.

The plaintiff's last argument is that he provided certain additional consideration for the defendants' promises sufficient to make them enforceable. The law is clear in the majority of jurisdictions, including Minnesota, that a written agreement may be modified by subsequent oral promises if there is new and valuable consideration to support such modification. See e.g. Bussard v. College of St. Thomas, Inc., 294 Minn. 215, 200 N.W.2d 155 (1972); 17A C.J.S., Contracts §§374-75 (1963); Annot. 60 A.L.R. 3d §5, pp. 244-49. Relying primarily on Bussard the plaintiff has asserted that he has provided other consideration in three basic forms which

support his claim for lifetime employment.

The plaintiff initially argues that his refusal to accept or seek other employment services as new consideration for the oral promises, but the plaintiff has not presented any evidence of any other employment opportunities which he rejected because of his employment with the defendants. Even assuming the plaintiff can demonstrate such opportunities, other courts have been faced with this claim and have held that this is insufficient as a matter of law to serve as consideration for the defendants' alleged promises. See e.g. Degen, supra; Winand v. Case, 154 F.Supp. 529, 540 (D. Md. 1957).

Secondly, the plaintiff's contention that his relinquishment of his former position and relocation with the defendants serves as consideration for the modification is not presuasive to the Court. The relocation relied upon herein occurred when the plaintiff transferred to a new divisional office of the defendants. It is undisputed the defendants reimbursed the plaintiff for all moving expenses incurred in the transfer. Again, other courts have rejected claims similar to this and such rule is set forth as follows:

> [A] relinquishment by the employee of a job, business, or profession in order to accept a contract of permanent or lifetime employment does not constitute, without more, sufficient additional consideration to support the

> alleged contract of employment, the reason being that any employee who gives up one job in order to accept another is merely placing himself in a position whereby he can accept the latter employment, and that such is the case whether the latter employment is for an indefinite period, a specified period, or for life. Annot. 60 A.L.R. 3d at 264.

See also Ferreyra v. E. & J. Gallo Winery, 231 Cal. App. 2d 426 (1964); Fisher v. Jackson, 142 Conn. 734, 118 A.2d 316 (1975). The plaintiff may not successfully rely on his transfer to support the additional consideration requirement for the contract modification.

Lastly, the plaintiff contends that his performance of certain "community services" constitutes additional consideration sufficient to support the defendants' promises. The plaintiff evidently has engaged in providing services for organizations such as the United Fund and for his local church and hospital which he asserts have benefited the defendants herein. The Court believes it is apparent that such services likely served primarily as a personal and professional benefit to the plaintiff. Even if they did indirectly benefit the defendants' business, they were incidental to what was expected of him as an employee of the defendants. They fall far short of providing any consideration outside of his contractual obligations.

In Sections 6 through 13 of the above-cited annotation, the types of "additional consideration" are discussed which have been considered substantial and sufficient to support a promise for lifetime employment. It is quite clear that those acts relied upon by the plaintiff herein are plainly insufficient to serve as new considerations outside the contract. Similarly, the Bussard case relied upon by the plaintiff is distinguishable from this action in that in such case there was no written contract provision relating to termination of the employment relationship and the employee therein had made a gift to the employer of approximately $350,000 worth of stock in exchange for a lifetime position with the employer. The "additional consideration" allegedly provided by the plaintiff herein falls far short of what was provided by the employee in Bussard.

The Court believes it would be unwarranted to permit the plaintiff to enforce oral statements of the defendants that he had a "lifetime" position with them in direct contradiction to the clear and express provisions of their written agreements and without the plaintiff providing any meaningful additional consideration to the defendants for such promises. Contracts for lifetime employment are disfavored in the law, in that they run afoul of normal business custom and bind each party to potentially impractical arrangements. When such contracts are based totally upon oral promises, in direct contradiction to written terms, they are usually too indefinite

to be enforceable. Such agreements also lack mutuality of obligation for the reason most employees would not normally expect that if they were to voluntarily terminate the employment relationship in order to better their own position in life, they would face liability for breaching such contract. In short, the Court believes the employment relationships entered into herein were terminable at the will of either party without cause, provided the proper notice requirements were complied with.

In conclusion, this Court finds nothing in the record to indicate this case does not fall squarely within the above-discussed general rules which are universally recognized in Minnesota as well as the majority of jurisdictions of this country. Although the plaintiff has cited various cases where oral promises for permanent employment have been enforced, the facts of this case do not justify the enforcement of the promises made herein. The plaintiff has not tendered to the Court any statement of genuine issues of fact, which is required by Rule 10 of the Local Rules of this Court when opposing a motion for summary judgment. The plaintiff's brief in opposition to the motion makes it clear that the material facts herein are not in dispute and that the Court must interpret the applicable law in light of such facts. The Court believes it has properly done so and that the defendants' motion for summary judgment should be GRANTED.

Findings of fact and conclusions of law have not been separately set forth,

but have been incorporated into the body of the foregoing entry as required and authorized by Rule 52 of the Federal Rules of Civil Procedure.